APPEAL NO. 92146
FILED MAY 27, 1992

On February 28, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. (Hearing officer) determined that the claimant, appellant herein, no longer suffered disability as a consequence of his (date of injury) injury, effective September 23, 1991, and thus was not eligible for temporary income benefits. Compensability of the injury, incurred two months after appellant had been employed as a laborer for (employer), was not disputed by the respondent. The hearing officer declined to find in the respondent's favor on its contention that he should apply a presumption that maximum medical improvement (MMI) had been reached.

The appellant argues that the evidence indicates that he remained disabled, and he points primarily to the opinion of his treating doctor that he would be released to work effective April 1, 1992, and achieve MMI by June 1, 1992. Respondent notes that appellant failed to prove that disability continued, and that the record would have allowed the hearing officer to find that disability ceased as of April 24, 1991, the date when appellant was videotaped working on his automobile and bending with no observable impediment to his movements.

DECISION

The decision of the hearing officer is affirmed.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. art. 8308-6.34(e) (Vernon Supp. 1992) (1989 Act). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. Civ. App.-Beaumont 1991, n.w.h.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The claimant must also prove that the injury is the producing cause of resulting disability. *See* Travelers Insurance Co. v. Rodriguez, 453 S.W.2d 857 (Tex. Civ. App.-Eastland 1970, writ ref'd n.r.e.). The trier of fact is not required to accept the testimony of the claimant, and may weigh it along with other evidence in the record. Presley v. Royal Indemnity Insurance Co. , 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

Briefly summarized, the record indicates that appellant was diagnosed with a lumbar strain by Dr. D on March 22, 1991, and remained under his care until the end of April, 1991. Appellant was referred to Dr. S, who prescribed work hardening therapy in September 1991. Notes from the therapy group indicate that appellant was not compliant with instructions given during physical therapy and did not attend regularly the first week, with two late arrivals and two instances of non-attendance. Appellant stated he stopped attending because he did not believe his condition was being helped, and he wanted to get back with Dr. D. Appellant ceased therapy and returned to Dr. D. on September 23, 1991. By medical report dated January 30, 1992, Dr. D indicated that appellant could return to light duty April 1, 1992, and would achieve MMI by June 1992. The diagnosis, lumbar strain, remained the same. Appellant testified that he also had a magnetic resonance imaging (MRI) test and x-rays; however, the results are not described in the record. Dr. D's billings for treatment of appellant's back strain totalled $2,096 from September 23, 1991, through mid-January 1992; his billings for earlier treatment of appellant during March 1991 totalled $1,451.

Appellant testified that he had not sought employment since his last day of work for employer on (date of injury). He admitted that he had not been truthful when he stated on his job application that he had never

been convicted of a felony, and when he told the insurance adjuster that he had not filed any previous workers' compensation claims. The record indicates that appellant filed three previous claims for back injuries, and that he had been employed on each occasion for less than a month when he sustained the three previous injuries. Each claim was settled by compromise settlement agreement under the law in effect prior to January 1, 1991. Appellant disputed that he had not been compliant with his therapy program, and attributed some of the differences in his testimony and the opinions expressed by the doctor and therapists at the therapy group to lies.

A videotape admitted into evidence was made April 24, 1991. The tape lasts nearly 2 1/2 hours and was taken over a period from around 7:30 in the morning until nearly 2:00 o'clock in the afternoon. Appellant is working on an automobile. The tape shows appellant at various times lying on his back under the car, lying on his side next to the car, rising from both positions, bending and lifting objects he estimated as weighing 15-20 pounds from a 90 degree angle, reaching into the interior of the car and leaning in to retrieve objects, opening and closing the car doors, the car hood, and the trunk, getting on a hands-and-knees position next to the car, rolling from side to stomach and rising from a "push-up" position to his feet, and lifting and carrying a cylindrical object. At one point, appellant trots at a light jogging pace down the sidewalk of the street where the car is parked. There is no observable difficulty in carrying out these activities. Appellant stated that these activities would be very different from those performed at the construction site (operating a jackhammer, lifting concrete chunks and pushing a wheelbarrow) and that he was taking over-the-counter pain medication at the time the tape was made.

There is sufficient probative evidence in the record to support the decision of the hearing officer, and we affirm his decision.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge